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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 560

BOARD OF SATANTA JOINT RURAL HIGH SCHOOL DISTRICT No. 2, WILLIAM H. HELTON and ELWIN ANTHONY, Individually and As Members of Said Board,
Appellants,

vs.

THE HASKELL COUNTY PLANNING BOARD and the Members Thereof, HAROLD LOWER, RUSSELL WINTERS, WESLEY LUCAS, CHARLES McDONALD, ELWIN ANTHONY and JOE STARKE, and ADEL THROCKMORTON, State Superintendent of Public Instruction,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS.

BRIEF OPPOSING MOTION TO DISMISS

*DALE M. STUCKY
RICHARD I. STEPHENSON
1600 Wichita Plaza
P. O. Box 997
Wichita, Kansas 67201
Attorneys for Appellants
EUGENE L. SMITH
Liberal, Kansas 67901
One of the Attorneys for Appellants

FLEESON, GOODING, COULSON & KITCH
1600 Wichita Plaza
P. O. Box 997
Wichita, Kansas 67201
Of Counsel

*Attorney upon whom service is to be made.

E. L. MERRIHEW, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3080

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS.

BRIEF OPPOSING MOTION TO DISMISS

The disposition of a companion case[1] by this Court on October 10, 1966, should not control the disposition of this cause.

1. *Board of Satanta Joint Rural High School District No. 2 et al.* v. *Grant County Planning Board et al.*, No. 192, October Term, 1966, ... U.S. .....

Unlike such previous case, this cause was a suit for declaratory judgment brought as a class suit on behalf of *resident electors.* Appellants relied in their briefs and in their oral arguments solely upon the grounds that the statute, as further applied, violated constitutional rights of resident electors under the First and Fourteenth Amendments to the United States Constitution, asking for a judgment declaratory of their rights thereunder.[2]

Appellees also briefed and argued the merits of appellants' constitutional contentions.[3]

The statement of the Attorney General of Kansas, made before the Kansas Supreme Court in argument below, that the election procedure in question was designed merely as a *"safety valve,"*[4] since *"The Legislature and everybody knows that the people do not know anything about school boundaries"* amply demonstrates the position taken by appellees below to justify the statute, as applied, in order to avoid appellants' constitutional attack.

The Supreme Court of Kansas decided the case on the merits and not on state grounds. The only question presented on the merits below is the very question here on appeal. While the opinion below, for some reason, did not "expressly" discuss the federal question, the judgment of that court necessarily decided, adversely to appellants, the

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2. See excerpts from Brief of Appellants in the Supreme Court of Kansas, attached as Appendix "A" hereto.

3. See excerpts from Brief of Appellee Adel F. Throckmorton, State Superintendent of Public Instruction, attached as Appendix "B" hereto. Appellees sought to have the appeal in the Court below *dismissed* because of alleged procedural defects stated as Points I and II (mootness and no controversy exists). But the Supreme Court of Kansas did not dismiss the appeal, but, rather decided the appeal on its merits, *affirming* the judgment below (Jurisdictional Statement, p. A1).

4. This is in accord with *Board of Satanta* v. *Grant County Planning Board,* 195 Kan. 640, at 647, where the Kansas Court stated that "the legislature may *use* the vote of electors in such capacity *as it sees fit.*"

only question before it for decision on the merits—the federal question presented here.

Appellees are therefore incorrect in suggesting, for the first time in this Court, that the federal question sought to be reviewed was not timely raised. They are also obviously incorrect in stating that the federal question was not passed upon below.

We respectfully urge that the novel and cavalier effort in Kansas to transform traditional election procedures into devices for the sole purpose of administering mere straw votes or public opinion polls constitutes such an abrasive and corrosive attack on necessarily determinative election procedures as to violate due process requirements of our Federal Constitution.

We further urge that political considerations making it convenient for the legislature to use such a device as a mere gesture or "safety valve" to avoid outrage from the unsuspecting public are insufficient to remove such constitutional objections, and that euphemistically describing the device as "advisory"[5] does not so change the nature of the device so as to escape such constitutional objections

Respectfully submitted,

*Dale M. Stucky
Richard I. Stephenson
1600 Wichita Plaza
P. O. Box 997
Wichita, Kansas 67201
Eugene L. Smith
Liberal, Kansas 67901
Attorneys for Appellants

5. *Board of Satanta* v. *Grant County Planning Board*, 195 Kan. 640, at 647.

*Counsel upon whom service is to be made.

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